

ILLINOIS INDEPENDENT TAX TRIBUNAL

TYLER R. and TALBOT DEBUTTS)	
CAIN,)	
Petitioners,)	
)	
v.)	No. 15-TT-63
)	
THE ILLINOIS DEPARTMENT OF)	
REVENUE,)	
Respondent.)	

DEPARTMENT’S § 2-619 MOTION TO DISMISS COUNTS III & IV OF PETITION

Respondent, the Illinois Department of Revenue (hereafter the “Department”) by its attorney, respectfully moves this Tribunal, pursuant to 735 ILCS 5/2-619(a)(1) and 86 Ill. Admin. Code 5000.315, for an order dismissing Counts III and IV in the Petition of Tyler R. Cain and Talbot Debutts Cain (“Petitioners”), for lack of subject matter jurisdiction. In support of its motion, the Department states as follows:

BACKGROUND

1. After conducting an audit of Petitioner for the tax year ending December 31, 2007, the Department issued a Notices of Deficiency (hereafter “Notice”) to Petitioner on February 5, 2015 assessing \$118,671.60 of taxes, interest, and penalties.
2. The Notice was attached to the Petition as Exhibit B.

§ 2-619 STANDARD

3. A motion filed under § 2-619 provides a means of disposing of legal or easily proved factual matters at the outset of a case. *Cramsey v. Knoblock*, 191 Ill. App. 3d 756, 764 (4th Dist. 1989).
4. A § 2-619(a)(1) motion to dismiss is the proper avenue to raise lack of subject

matter jurisdiction. *Zimmerman Equipment Co. v. F.R. Orr Grain Co.*, 29 Ill.App.3d 921, 922, 330 N.E.2d 881 (3rd Dist. 1975); *Ferris, Thompson and Zweig, Ltd., v. Esposito*, 2014 IL App (2d) 130129, ¶ 10.

5. “It is well settled that the issue of subject matter jurisdiction cannot be waived, stipulated to, or consented to by the parties. It can be raised at any time and even *sua sponte* when necessary.” *Eschbaugh v. Industrial Com'n*, 286 Ill.App.3d 963, 967-68 (5th Dist. 1996) (Internal citations omitted.).

SOVEREIGN IMMUNITY

6. In the Illinois Constitution of 1970, this state abolished the defense of sovereign immunity “[e]xcept as the General Assembly may provide by law.” *Fritz v. Johnston*, 209 Ill.2d 302, 309 (2004) (quoting Ill. Const. 1970, art. XIII, § 4).

7. In response, the legislature enacted the State Lawsuit Immunity Act (Immunity Act) (745 ILCS 5/0.01 et seq.). Section 1 of the Immunity Act states: “Except as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, and Section 1.5 of this Act, the State of Illinois shall not be made a defendant or party in any court.” 745 ILCS 5/1.

8. Section 8 of the Court of Claims Act (705 ILCS 505/1 et seq.) holds that the Court of Claims has exclusive jurisdiction to hear:

(a) All claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency; provided, however, the court shall not have jurisdiction (i) to hear or determine claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for expenses in civil litigation, or (ii) to review administrative decisions for which a statute provides that review shall be in the circuit or appellate court

* * *

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, ***.

705 ILCS 505/8.

9. In *Fritz*, the Court held that “[t]his language is clear and unambiguous; all claims against the state for damages sounding in tort must be brought in the Court of Claims—no other tribunal, including our circuit courts, has jurisdiction of any such claim.” *Fritz*, 209 Ill. 2d at 310.

TRIBUNAL’S JURISDICTION

10. The Illinois Independent Tax Tribunal Act of 2012 (hereafter the “Tribunal Act”) contains the following jurisdictional limitations:

Except as provided by the Constitution of the United States, the Constitution of the State of Illinois, or any statutes of this State, including, but not limited to, the State Officers and Employees Money Disposition Act, the Tax Tribunal shall have original jurisdiction over all determinations of the Department reflected on a Notice of Deficiency, Notice of Tax Liability, Notice of Claim Denial, or Notice of Penalty Liability issued under [specific tax acts]

* * *

Jurisdiction of the Tax Tribunal is limited to Notices of Tax Liability, Notices of Deficiency, Notices of Claim Denial, and Notices of Penalty Liability where the amount at issue in a notice, or the aggregate amount at issue in multiple notices issued for the same tax year or audit period, exceeds \$15,000, exclusive of penalties and interest.

35 ILCS 1010/1-45(a).

11. In regard to fees sought pursuant to the Illinois Administrative Procedure Act, (hereafter, the “APA”), the Tribunal Act provides in pertinent part:

The Tax Tribunal shall not assign any costs or attorney's fees incurred by one party against another party. Claims for expenses and attorney's fees under Section 10-55 of the Illinois Administrative Procedure Act shall first be made to the Department of Revenue. If the claimant is dissatisfied because of the Department's failure to make

any award or because of the insufficiency of the award, the claimant may petition the Court of Claims for the amount deemed owed.

35 ILCS 1010/1-55(d). (Emphasis added.)

12. An administrative agency's powers are "strictly confined to those granted in [its] enabling statutes." *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108, 115 (1976). See also *Vuagniaux v. Dep't of Prof'l Regulation*, 208 Ill.2d 173, 186 (2003) (holding that an administrative agency "has no general or common law authority. The only powers it possesses are those granted to it by the legislature, and any action it takes must be authorized by statute.").

13. In *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108 (1976), the Illinois Supreme Court held: "Since the Commission is a statutory creature, its powers are dependent thereon, and it must find within the statute the authority which it claims. Such agencies have no general or common law powers." *FEPC*, 65 Ill.2d at 113. (Internal citations omitted.) See also *Vuagniaux v. Dep't of Prof'l Regulation*, 208 Ill.2d 173, 186 (2003) (holding that an administrative agency "has no general or common law authority. The only powers it possesses are those granted to it by the legislature, and any action it takes must be authorized by statute."); *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL App (1st) 130544, ¶ 16 (holding that administrative agencies, including quasi-judicial ones, do not possess any common law powers or general jurisdiction that a circuit court exercises or possess).

14. It is well established that "attorney fees and the ordinary expenses and burdens of litigation are not allowable to the successful party in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof." *FEPC*, 65 Ill.2d at 113.

15. In *City of Chicago v. Fair Employment Practices Comm'n*, the Illinois Supreme Court held that the agency had no authority to award attorneys' fees or cost and that its order was void ab initio. *Id.* at 115.

**Count III Must Be Dismissed Because This Tribunal
Is Prohibited From Assigning Costs or Fees Under the APA**

16. In the case at bar, not only is there no specific grant of authority to award fees pursuant to § 10-55 of the APA, the Tribunal Act specifically precludes any claim under § 10-55 of the APA. Additionally, the Tribunal Act prohibits this Tribunal from assigning “any costs or attorney's fees incurred by one party against another party.” 35 ILCS 1010/1-55(d).

17. In Count III, Petitioner specifically invoked Section 10-55 of the Illinois Administrative Procedure Act

18. For example, in Paragraph 52 Petitioner quotes Section 10-55 of the APA, and in Paragraph 55 alleges that “Section 10-55 of the APA is applicable to this contested case proceeding.” And in his request for relief Petitioner requested:

WHEREFORE, Plaintiff prays that the Tax Tribunal enter an Order declaring that the Department, through its NOD, made an untrue allegation, without reasonable cause to do so, and that the Department shall award to Plaintiff the amount of his reasonable expenses and attorney fees incurred to defend against the Department's NOD and in obtaining the award pursuant to Section 10-55 of the APA.

19. Based on the Tribunal Act's explicit exclusion of any claims made under or pursuant to Section 10-55 of the APA, Petitioner's Count III cannot stand.

20. The Tribunal Act expressly prohibits this Tribunal from assigning costs or fees of litigation, and expressly requires a taxpayer to make claims for expenses and fees first to the Department and then to the Court of Claims. 35 ILCS 1010/1-55(d).

21. Therefore, this Tribunal has no jurisdiction to entertain or consider the relief sought in Count III, and Count III must be dismissed.

**Count IV Must Be Dismissed Because this Tribunal
Lacks Subject Matter Jurisdiction Over Suits Under the Taxpayer’s Bill of Rights**

22. In Count IV, Petitioner specifically invoked Section 5 of the Taxpayer Bill Rights, (20 ILCS 2520/5) (hereafter the “TBR”) as a basis for his demand for “the maximum amount of damages allowed under the Taxpayers’ Bill of Rights.” See Petition. 20 ILCS 2520/5.

23. In addition to the Tribunal Act’s prohibition against the assignment of costs and fees, further evidence that the Legislature did not vest this Tribunal with jurisdiction over TBR claims can be found in comparing/contrasting the language in the Tribunal Act and TBR.

24. Section 5 of the TBR provides:

Sec. 5. Taxpayer's suits. Taxpayers have the right to sue the Department of Revenue if such Department intentionally or recklessly disregards tax laws or regulations in collecting taxes. The maximum recovery for damages in such a suit shall be \$100,000. If a taxpayer's suit is determined by the court to be frivolous the court may impose a penalty on the taxpayer not to exceed \$10,000 to be collected as a tax.

20 ILCS 2520/5. (Emphasis added.)

25. A longstanding canon of statutory construction holds that where the legislature uses one term in one instance and a different but analogous term in another, it intends different results. *Julie Q v. Dep’t of Children and Family Servs.*, 2011 IL App (2d) 100643, ¶ 43, 963 N.E.2d 401 (2d Dist. 2011) (citing *Collins v. Bd of Trs. of Firemen's Annuity & Ben. Fund of Chicago*, 155 Ill.2d 103, 113 (1993) (“the use of different language indicated that the legislature intended different meanings and results.”); *Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 100 (1964) (“use by the legislature of certain language in one instance and wholly different language

in another indicates that different results were intended.").

26. In the TBR, the Legislature used the terms “sue,” “suit” and “court” when it provided for the recovery of damages from the Department. 20 ILCS 2520/5. But in the Tribunal Act, the legislature used the terms “Tribunal” and “Petition.” 35 ILCS 1010/1-1 et. seq.

27. Therefore, “court” and “suit” as used in the TBR mean something different than “Tribunal” and “petition” as used in the Tribunal Act.¹

28. Additionally, the Tribunal can exercise only the powers given to it by the Legislature. The Tribunal has “original jurisdiction over all determinations of the Department reflected on a Notice of Deficiency” Damages are not “reflected on” a Notice, and nowhere did the legislature confer on the Tribunal the authority to award damages against the Department. 35 ILCS 1010/1-45(a).

29. Finally, pursuant to Section 8(a) of the Court of Claims Act, “the Court of Claims has exclusive jurisdiction to hear: (a) All claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency.” 705 ILCS 505/8. This provision encompasses Section 5 of the TBR. 20 ILCS 2520/5.

30. For the above reasons, this Tribunal does not have jurisdiction to hear or render a decision on Petitioner’s Counts III and IV.

WHEREFORE, Department prays this Tribunal grant Department’s Motion to Dismiss Counts III and IV of Petitioner’s Petition without delay so as to prevent the time and expense of needless discovery, discovery disputes, discovery motions, briefs, and discovery hearings,

¹ Department’s research revealed no decisions in which a circuit or appellate court awarded damages to the taxpayer pursuant to Section 5 of the Taxpayer’s Bill of Rights Act. 20 ILCS 2520/5. Thus, Department asserts that “court” in Section 5 of the Taxpayer’s Bill of Rights Act refers to the Court of Claims.

among other disputes that could arise in the litigation of Counts III and IV.

Respectfully Submitted,

LISA MADIGAN,
Attorney General, State of Illinois

By: _____

Special Assistant Attorney General

Rebecca Kulekowskis
Telephone: (312) 814-3318
Email: Rebecca.Kulekowskis@Illinois.gov

Jennifer Kieffer
Telephone: (312) 814-1533
Email: Jennifer.Kieffer@Illinois.gov

Special Assistant Attorneys General
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601

Facsimile: (312) 814-4344

DATED: August 5, 2015